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No. 156

In the Supreme Court of the United States

OCTOBER TERM, 1955

ELMER F. HEMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	3
Summary of argument	18
Argument	22
I. The trial court correctly applied the law announced in this Court's prior opinion as to the rebuttable presumption of prejudice raised by extraneous jury contacts	24
II. The Government has met its burden of establishing affirmatively that the extraneous jury contacts were harmless	30
Conclusion	41

CITATIONS

Cases:

Comstock v. *Group of Investors*, 335 U. S. 211	32
Delaney v. *United States*, 263 U. S. 586	32
Friedberg v. *United States*, 348 U. S. 142	4
Higgins v. *United States*, 160 F. 2d 222, certiorari denied, 331 U. S. 822	26, 37
Holland v. *United States*, 348 U. S. 121	4
Holmgren v. *United States*, 217 U. S. 509	26
Little v. *United States*, 73 F. 2d 861	28, 29, 30
Mattox v. *United States*, 146 U. S. 140	23, 25, 30, 36
McDonald v. *Pless*, 238 U. S. 264	36
Remmer v. *United States*, 347 U. S. 227	1, 4, 18, 22, 24, 27
Rubenstein v. *United States*, decided September 1, 1955	28
Ryan v. *United States*, 191 F. 2d 779, certiorari denied, *sub nom. Duncan et al.* v. *United States*, 342 U. S. 928	26, 37
Smith v. *United States*, 348 U. S. 147	4

a hearing with respect to alleged extraneous contacts with a juror which had occurred during the trial, the case was remanded to the District Court with directions to hold a hearing to determine "the circumstances [of the incident], the impact thereof upon the juror, and whether or not it was prejudicial." *Remmer* v. *United States*, 347 U. S. 227, 230.

After a three-day hearing, held pursuant to this Court's mandate, at which Judge Louis E. Goodman presided,[4] the District Court made findings of fact that the extraneous contacts disclosed were harmless to petitioner (R. 36, 37–39), and concluded that they in no way affected the fairness of the trial or the verdict of the jury (R. 39).

Petitioner then filed with this Court a petition for rehearing which was granted. The case was restored to the docket and the entire record, including the findings and order of Judge Goodman, was remanded to the Court of Appeals for reconsideration in the light of this Court's intervening decisions in the so-called "net worth" cases,[5] and in the light of Judge Goodman's findings and order (348 U. S. 904).

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[4] Judge Goodman had no previous association with the case and presided at the hearing by special designation. Judge Roger T. Foley, who presided at the trial, testified at the hearing.

[5] *Holland* v. *United States*, 348 U. S. 121; *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*, 348 U. S. 147; and *United States* v. *Calderon*, 348 U. S. 160.

The Court of Appeals, after consideration of supplemental briefs submitted by both parties, reaffirmed the judgment of conviction (R. 339-340). This Court granted a writ of certiorari limited to the questions presented under III A of the petition for the writ, namely, questions relating to the extraneous jury contacts (350 U. S. 820).

In accordance with the opinion and mandate of this Court (347 U. S. 227), the Government assumed the burden of proof at the supplemental hearing on the matter of the extraneous jury contacts. It adduced the testimony of every person who could possibly have any knowledge of the matter, including all twelve jurors and the two alternates, members of the prosecution staff, the trial judge, and the agent of the Federal Bureau of Investigation who conducted the investigation referred to hereafter.

The evidence to support Judge Goodman's findings that the contacts were harmless to petitioner may be summarized as follows:

Irving J. Smith, a real estate and insurance broker in Reno, Nevada, for 19 years (R. 49), was foreman of the jury which tried petitioner (R. 61). On Tuesday evening, December 18, 1951 (R. 154, 166), after the trial had been in progress for three weeks, James A. Satterly visited the Smith home accompanied by his wife (R. 50, 112, 154, 166). Smith was well acquainted with Satterly and had known him for about five years. The relationship between the two was not that of

ing to Smith: "When you have finished with whatever you are doing, we could go hunting". She added that she thought the hunting suggestion was "more or less a joke" (R. 126). She testified that her husband "always joked" (R. 125). Mrs. Smith did not hear Satterly's remark but she did hear her husband inform Satterly, in a raised voice which attracted her attention, that he could not discuss the trial. She then heard Satterly laugh."[10] (R. 128.)

Smith did not regard Satterly's remark as a serious proposal (R. 96–98). He thought the remark was made in jest (R. 53–54, 73–74, 89, 155) because "Satterly was in the habit of joking quite a lot" (R. 89). But he was not entirely certain of Satterly's intentions (R. 89, 222), and he was troubled about whether he should report the incident to Judge Foley in view of the latter's repeated instructions to the jury. At each recess, Judge Foley instructed the jury not to permit anyone to discuss the case with them and to report to the court any individual who persisted in discussing the case after having been informed that they were members of the jury. Smith reasoned that the incident did not come within the scope of the Judge's instructions, since Satterly did not persist in discussing the case. Yet, due to the nature of the remark, he felt that

[10] She did not question her husband about it during the trial because her husband did not discuss the case with her (R. 130).

he should have some counsel, and Judge Foley was the only one with whom he properly could discuss it. After turning the incident over in his mind for a day, he decided to report it to the judge. (R. 53–54, 73–74, 89.)

On Thursday, December 20, 1951, during the morning recess in the trial, Smith related the incident to Judge Foley in the latter's chambers (R. 133). He quoted Satterly as having made substantially the following comment (R. 134):

> I know Bones Remmer. You are a member of the jury. Why don't you make a deal with him?

Smith informed Judge Foley that he thought Satterly had made the remark in jest (R. 134). After inquiring into the details of the conversation, Judge Foley agreed with Smith that the remark "sounded like a joke," and he instructed Smith to regard it as such (R. 56, 81, 134). He also instructed Smith that, even if Satterly was not joking, Smith should not let the incident influence him against the petitioner "because it could very well be that some busybody might be trying to work his way into the case somewhere, and without any knowledge on the part of Mr. Remmer" (R. 134). Judge Foley was satisfied, after discussing the incident with Smith, that it had no unfavorable impact upon Smith (R. 231).

Although Judge Foley believed that Satterly's remark was not intended as a serious proposal, he thought that Satterly should be investigated

in order to determine whether, in fact, he had any connection with the defense or any ulterior purpose in making the comment. Accordingly, he summoned a member of the prosecution staff, Bruce R. Thompson, to his chambers, informed him of the incident and requested an investigation of Satterly's background and associations. He did not inform defense counsel of the incident.[1] (R. 135–137, 226–228.)

The following morning, Friday, December 21, 1951, Thompson contacted T. Hiram Callister, a Special Agent of the Federal Bureau of Investigation, and after informing him of the incident and of Judge Foley's request he asked that an investigation be made of Satterly (R. 151, 229). Callister sought and received authorization to conduct whatever investigation Thompson desired. Thompson instructed Callister to obtain some background information on Satterly and to interview him. (R. 151, 229.) He told Callister to interview Smith as a starting point (R. 233), and after obtaining what information he could on Satterly, to report back to him (R. 151).

On Saturday morning, December 22, 1951, Callister interviewed Smith in the latter's office (R.

[1] Judge Foley did not inform the defense because he felt that to do so would jeopardize the investigation in the event Satterly was acting in concert with the defense. Although he did not believe that a serious attempt had been made to influence a juror or that Satterly was connected with the defense, he reasoned that both possibilities had to be taken into account. (R. 136–137.)

152). At the outset, he advised Smith of the purpose of the interview and of the investigation which he was conducting. He was careful to explain to Smith that it was Satterly's conduct which was under investigation. (R. 152–153, 169–170.) He then asked Smith about the nature of his relationship with Satterly and the details of the conversation in question. He also asked for any information which Smith could furnish concerning Satterly. (R. 57–60, 152–156.)

In the course of the interview, Callister asked Smith if he thought Satterly had made a serious proposal, and Smith replied that "he did not consider it [as] such". Smith added that "he felt that Mr. Satterly might have been feeling him out," but that he did not believe Satterly had been in contact with Remmer. He pointed to the possibility that if his reception had been cordial Satterly might have contacted Remmer and might have considered setting up a deal. (R. 155.) Smith also told Callister that he thought over the incident and at first was not going to report it "because he thought it was a joke" and that he decided to report it "because the Judge had been so specific in instructing them" (R. 155). Callister made notes of the interview with Smith (R. 166–168).

Callister could not locate Satterly for questioning. His inquiries disclosed that Satterly had left the area before the investigation was requested. Callister then checked Satterly's credit and criminal record. On December 24, 1951, Cal-

lister reported the results of the investigation to Thompson and asked Thompson if he wanted Satterly located and interviewed or any further investigation made. Thompson requested him to consult Judge Foley on the matter. (R. 157–158, 232–233.)

Callister related the results of the investigation to Judge Foley on January 4, 1952,[*] and Judge Foley told him that no further investigation was necessary. On March 10, 1952, Thompson reviewed the matter with Callister and advised him that no action against Satterly was contemplated (R. 158, 230). The F. B. I. did not interview Satterly until a month prior to the supplemental hearing in 1954 (R. 120, 161).

Smith did not inform anyone except Judge Foley and Callister, of Satterly's remark, and he did not mention his interviews with the judge and Callister to anyone until after the return of the verdict (R. 61, 78, 107). The other eleven jurors and the two alternates testified unanimously that Smith had never mentioned the incident to them during the trial (R. 172, 180, 181, 182, 183, 193, 195, 213, 214, 215, 217, 219).

After the interview with Callister, Smith dismissed the incident completely from his mind. It was not brought to his attention again until the trial was over. After the jury had returned their

[*] Callister did not report to Judge Foley earlier because the trial was recessed over the holidays and the judge was not available (R. 158).

verdict and had been discharged, Smith was approached by newspaper reporters as he was leaving the courtroom and questioned about the conversation with Satterly. Smith had so completely removed the matter from his mind that he was "dumbfounded" by the questions. (R. 65–66, 101–102, 106–108.)

On the night the jury returned the verdict, after deliberating for two and a half days (R. 179), Smith rode back to Reno from Carson City with jurors Mack and Tinkham.[2] During the ride home they engaged in a general conversation about the trial. They agreed that the long trial had been a "strain", and there was a general expression of relief that it was over. (R. 184.) Juror Parker had in fact fainted after the verdict was returned and the jury was leaving the courtroom (R. 180). In the course of the conversation, Smith mentioned, in a casual way and without going into any details, that it was possible he had been approached during the trial but that he had reported the matter to the judge and had passed it off as a joke (R. 183–187). Upon reaching Reno, Smith, who had left his car at Tinkham's house, drove Mrs. Mack home. Mrs. Mack testified that when they arrived at her home she thanked Smith for the ride, and that he replied in substance that he wanted to thank her for

[2] During the trial, Smith, Mack and Tinkham, plus alternate juror Morris, formed a car pool for the trips to and from Carson City and Reno (R. 98, 102–103, 172).

working with him on the jury because he had been under pressure; he added that someday he would get together with her and discuss it. (R. 174–178.) Smith denied that he made the comments attributed to him by Mrs. Mack (R. 103).

At the hearing, Smith testified, over petitioner's objections, that he was not in any way prejudiced against the petitioner by the incident in question. Judge Goodman, in admitting the testimony, pointedly observed that he was not going "to decide this matter on the basis of statements of opinion of any of the witnesses." (R. 61–65.) Smith also testified, in response to questions by counsel for petitioner, that had he considered Satterly's remark as a serious proposal "it might have influenced me to favor Mr. Remmer" (R. 97). He explained that, had he regarded the matter seriously, he would have thought that Satterly was trying to concoct a deal for himself by exploiting petitioner (R. 97–98). Smith never entertained the thought that Satterly was connected with petitioner (R. 98, 154–155, 260). Satterly in fact did not know petitioner personally (R. 112, 118).

Another juror, Richard J. Curnow, testified that as he was leaving the courthouse one day during the trial,[14] he was asked by deputy marshal

[14] One of petitioner's counsel testified that, when he interviewed Curnow in 1953, the latter fixed the time at about midway in the trial (R. 265).

Hubert Boyd, whom he had known for sometime, whether he had heard any discussion among the jury indicating that one of the panel had been approached, that he replied in the negative and inquired why the question was asked, and that Boyd said "well, he was just curious" [15] (R. 200; 208, 209). Curnow testified further that, at the time, he thought Boyd's question might concern juror Mack, since he recalled seeing her go into the judge's chambers, but that later (the record does not indicate when) he learned that Mrs. Mack had discussed with the judge a matter relating to illness (R. 209–211). Counsel for petitioner offered in evidence a signed statement made by Curnow in March 1954, in which he stated that Boyd's question had no influence on his verdict in the case (R. 210–211). Boyd denied asking Curnow anything about the case. He testified that during the trial he did not hear of any incident involving a juror. (R. 249–252.)

Alternate juror Morris testified to a conversation which he had with Smith about two weeks after the trial at which time the incident in question had become a matter of public knowledge through newspaper stories. Morris related that, in discussing the incident with Smith, the latter told him that he knew Satterly and that Satterly "joked a lot," and that he (Smith) "figured" the

[15] Curnow added that, "I presume he was merely checking, to do his particular job or his duty". Upon motion of the petitioner, this part of the testimony was stricken. (R. 200.)

remark was a joke but "kind of wondered if the man [Satterly] was feeling him out", and that he reported it to the judge because he was uncertain as to what he should do about it. (R. 221–222.)

Judge Goodman made findings of fact that Smith regarded Satterly's remark as jocular (R. 35); that Smith's conduct was not under investigation and that the purpose of the investigation was to determine whether Satterly had committed an offense against the laws of the United States (R. 37); that Satterly's comment to Smith was harmless (R. 38–39); and that the interview between Smith and the F. B. I. agent (Callister) had no effect whatever upon Smith's judgment, integrity or state of mind as a juror (R. 37–38). He concluded that the "incident complained of" was entirely harmless to petitioner and did not have the slightest bearing upon the integrity of the verdict (R. 39). He also concluded that, if deputy marshal Boyd had questioned juror Curnow during the trial as to whether he had heard any discussion among the jury about one of the panel having been approached, the alleged inquiry did not in any way affect the jury's verdict (R. 36).

The hearing pursuant to the mandate of this Court was a full and unrestricted inquiry into all aspects of the matters complained of by petitioner. Judge Goodman advised counsel during the hearing that, due to the nature of the inquiry,

he would not insist upon strict adherence to technical rules of examination and was allowing the parties wide latitude in the presentation of evidence (R. 99–100, 204).

SUMMARY OF ARGUMENT

I

When the case was here before, the Court held that any irregular contact with a juror about the matter pending before the jury was presumptively prejudicial. However, the Court also held that the presumption is rebuttable, and that it can be overcome if the Government sustains the heavy burden of proof cast upon it and satisfies the District Court that the contact was in fact harmless to the defendant. The case was, therefore, remanded for a hearing to determine whether the circumstances were harmful. 347 U. S. 227. In so holding, the Court followed a rule to which it had given previous consideration, and one which petitioner himself appeared to urge it to follow.

Now, however, petitioner's argument seems to be that there is what is tantamount to a conclusive presumption of harm whenever it is established that the extraneous communication was of a serious nature. He argues that the District Court should have determined, not whether actual harm resulted to petitioner, but whether the circumstances created a condition from which harm might arise. If this were the rule, this Court would have reversed the conviction as a matter of

law, instead of remanding it for a hearing on the motion for new trial since the facts conceded by the Government before the Court established a reasonable *possibility* of harm.

It is the reasonable possibility of harm inherent in any irregular jury contact of a serious nature which gives rise to the presumption of prejudice which this Court has held to be rebuttable, and the cases on which petitioner relies confuse the basis for the rebuttable presumption with the presumption itself. Here, as we show below, the evidence is sufficient to sustain the Government's burden of proof that the extraneous jury contacts were harmless to petitioner, and the District Court so found. It was not required to decide the matter on the basis of any other measure of proof. In any event, the evidence which sustains the findings that the jury contacts were actually harmless is also sufficiently strong to foreclose any real likelihood of harm to petitioner.

II

The hearing pursuant to the mandate of this Court was a full and unrestricted inquiry into all matters complained of by the petitioner. The private communications involving juror Smith, *viz.*, his conversation with Satterly, his discussion of the conversation with Judge Foley, and his interview with an F. B. I. agent, were fully probed. The alleged private communication between juror Carnow and deputy marshal Boyd was likewise

thoroughly explored at the hearing. The District Court found as a fact that the matters complained of by the petitioner were entirely harmless and in no way affected the fairness of his trial or the jury's verdict. The finding of the trial court is fully supported by the evidence.

Smith considered Satterly's suggestion that he make a deal with petitioner as a joke and, after discussing it with the trial judge, the latter instructed him to regard it as such. The evidence shows that Smith had good reason to regard the remark as made in jest. He not only regarded Satterly as a banterer but he never entertained the thought that the latter was connected with the defense. Judge Foley also believed the remark was made in jest. However, since he could not be certain of Satterly's intentions and recognized the possibility that the latter may have intended the remark as a serious proposal, he requested an investigation of his background and associations in an effort to determine whether he had any ulterior purpose in making the remark.

Smith was interviewed by an F. B. I. agent in the course of the investigation. The agent carefully explained to Smith that it was Satterly's conduct which was under investigation. There was never any suspicion or suggestion of improper conduct on the part of Smith. The investigation failed to disclose any information indicating that Satterly intended the remark as anything more

than a joke. Since this was Smith's reaction to the comment, and since he had been instructed by the court to regard it as such, there was no need during the trial either to inform Smith of the outcome of the investigation or further to neutralize in his mind any possible prejudicial implications in the remark.

Smith dismissed the incident completely from his mind after discussing it with Judge Foley and the F. B. I. agent, and it was not brought to his attention again until after the return of the verdict, when he was greatly astonished to hear about it. It is clear that he had completely forgotten the incident, and that it could not have influenced his verdict. Hence, the evidence supports the District Court's finding that Satterly's conversation with Smith was harmless to petitioner, and it also forecloses any real possibility that it could have harmed him.

The record also fully supports the District Court's conclusion that the evidence of an alleged conversation during the trial between juror Curnow and deputy marshal Boyd was too vague to form the basis of a finding that Boyd had asked Curnow if he had heard any discussion among the jury indicating that one of the panel had been approached, and also supports the finding that, if the conversation did actually take place, it did not in any way affect the integrity of the verdict. Petitioner's counsel offered in evidence a state-

ment signed by Curnow in which the latter disclaimed any bias or prejudice against petitioner as a result of the alleged conversation. Moreover, it appears that Curnow regarded the alleged query by Boyd as of no significance.

ARGUMENT

In remanding the case, the Court held that any irregular private communication with a juror during a trial raises a rebuttable, but not conclusive, presumption of prejudice, and directed the District Court to hold a hearing to determine whether what had occurred in this case was in fact harmful to petitioner, and if harmful to grant a new trial. *Remmer* v. *United States*, 347 U. S. 227, 229–230.

That hearing has now been held. The Government assumed the burden of proof and presented all witnesses who could possibly have had knowledge of the affair. Petitioner had full opportunity for cross-examination and for presentation of additional evidence. Judge Goodman found, after listening to three days of testimony and argument, that none of the circumstances divulged affected the fairness of the trial or the jury's verdict and that they were thus, in fact, harmless to petitioner. For that reason, he did not grant a new trial.

It is settled that the allowance or refusal of a new trial rests in the sound discretion of the

trial court, and is therefore reviewable only for an abuse of that discretion. *Mattox* v. *United States*, 146 U. S. 140. Thus, the reviewable question presented here is whether the District Court abused its discretion in refusing to grant a new trial.

Petitioner now contends that the District Court misconstrued the rule respecting the rebuttable presumption of prejudice announced in this Court's prior opinion in this case in connection with extraneous jury contacts. He argues that the District Court, in applying this rule, was required to find, not only that there was no actual harm to petitioner, but, in addition, that there was no reasonable possibility of such harm, and that the judge abused his discretion in not basing his decision on the latter measure of proof. As we shall show, this contention of petitioner is without merit, and, in addition, the evidence which affirmatively showed that there was, in fact, no prejudice, also excluded any real likelihood of prejudice, and thus justified the District Court's finding of actual harmlessness. Consequently, the District Court did not abuse its discretion in finding that the extraneous jury contacts were, in fact, harmless, and in holding that the rebuttable presumption of prejudice had been dispelled.

I

THE TRIAL COURT CORRECTLY APPLIED THE LAW ANNOUNCED IN THIS COURT'S PRIOR OPINION AS TO THE REBUTTABLE PRESUMPTION OF PREJUDICE RAISED BY EXTRANEOUS JURY CONTACTS

This Court held in its prior opinion in this case, *Remmer* v. *United States*, 347 U. S. 227, 229:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror *was harmless* to the defendant. *Mattox* v. *United States*, 146 U. S. 140, 148–150; *Wheaton* v. *United States*, 133 F. 2d 522, 527. [Emphasis added.]

After observing that it could not be determined from the record then before it whether the incidents which may have occurred were harmful or harmless, the Court remanded the case to the District Court with directions "to hold a hearing to determine whether the incident complained of *was harmful* to the petitioner, and if after hear-

ing it is *found to have been harmful*, to grant a new trial." (Emphasis added.) Clearly, the question framed by the mandate of this Court (R. 335–336) and grounded in its opinion (*supra*, pp. 3–4) was whether the extraneous jury contacts were in fact harmful to the petitioner.

In its opinion remanding the case, this Court reiterated the rule it had previously adopted in *Mattox* v. *United States*, 146 U. S. 140, 147–151. In that case a convicted murderer filed a motion for a new trial with supporting affidavits to show that a bailiff had made prejudicial remarks about the defendant to the jury and had read them a newspaper article about the trial while they were deliberating. The trial judge refused to accept the affidavits and denied the motion without a hearing. This Court said (146 U. S., at 150):

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least *until their harmlessness is made to appear*." [Emphasis added.]

Thus, the Court adopted the rule which attaches a *rebuttable* presumption to such "possibly prejudicial" communications and rejected the stricter rule followed by some state courts which had held a conclusive presumption of prejudice to arise upon proof of such a communication. 146 U. S., at 150–151. See *Wheaton* v. *United States*, 133 F. 2d 82 (C. A. 8); *Ryan* v. *United States*, 191

F. 2d 779, 781 (C. A. D. C.), certiorari denied, *sub nom. Duncan et al.* v. *United States*, 342 U. S. 928; *Higgins* v. *United States*, 160 F. 2d 222 (C. A. D. C.), certiorari denied, 331 U. S. 822; *United States* v. *Compagna*, 146 F. 2d 524 (C. A. 2), certiorari denied, 324 U. S. 867, rehearing denied, 325 U. S. 892. See also *Holmgren* v. *United States*, 217 U. S. 509, 520–523.

When this case was here previously, this was the rule which petitioner appeared to urge the Court to apply. He then argued (Brief for Petitioner, No. 304, October Term, 1953, p. 46):

> Thus, the court [below] departed from the well-settled principle that outside contacts with a jury raise a presumption of prejudice, *Mattox* v. *United States*, 146 U. S. 140, 150, and that the presumption *can be overcome* only by affirmatively showing that there was no prejudice *in fact*. *Stone* v. *United States*, 113 F. 2d 70, 77–78 (C. A. 6th); *Little* v. *United States*, 73 F. 2d 861 (C. A. 10th); *Wheaton* v. *United States*, 133 F. 2d 522 (C. A. 8th). [Emphasis added.]

What petitioner now contends (Pet. Br. 27–34), however, is that the presumption of prejudice which is raised upon a showing of an extraneous jury contact of a serious nature, relating to the case, is tantamount to a conclusive presumption. He argues that, under such circumstances, the presumption requires a new trial "unless the circumstances foreclose any reasonable possibility

of harm" (Pet. Br. 27). Hence, he urges that the trial court was required to find, not only that there was no actual harm to petitioner, but in addition that there was no reasonable possibility of harm.

But if this Court had contemplated that the presumption which attached to the extraneous jury contacts in this case was of a conclusive character, it is, as Judge Goodman pointed out (R. 38), highly unlikely that it would have remanded the case for a hearing. It was conceded, when the case was here before, that a remark had been made to the jury foreman suggesting that he could profit by bringing in a verdict favorable to petitioner, and that this incident had been investigated by the F. B. I. (347 U. S. at 228). This was undoubtedly a factual situation which, *in limine*, showed a "reasonable possibility of harm", and, if this Court had thought it proper to apply to these conceded facts a conclusive presumption, such as that indicated in the cases on which petitioner relies, it would, as Judge Goodman said (R. 38), have unquestionably ordered a new trial as a matter of law. But this Court did not do so. Instead, it held that a presumption of prejudice had been raised, which, although not conclusive, imposed a heavy burden of proof upon the Government to overcome, and then remanded the case to the District Court for a hearing to determine whether the extraneous

contacts were, as a matter of fact, harmful to petitioner.

To support his contention, petitioner relies (Pet. Br. 27–29) upon *Stone* v. *United States*, 113 F. 2d 70, 77 (C. A. 6); *Little* v. *United States*, 73 F. 2d 861, 865 (C. A. 10); *Rubenstein* v. *United States* (C. A. 10), decided September 1, 1955, 1955 Fed. Tax Rep., Vol. 5, ¶ 9708; and *United States* v. *Marine*, 84 F. Supp. 785, 787 (D. Del.). But the pronouncements in those cases, with respect to the quantum of proof required to overcome the presumption of prejudice attaching to an extraneous jury contact, are contrary to this Court's holdings in *Mattox* and the instant case. In both the *Mattox* and the present case, this Court held that such a presumption may be overcome by a clear showing that the jury contact, in fact, was harmless.

The *Stone* and *Marine* cases hold that the presumption of prejudice is overcome only by a showing that no harm *might* (*Stone*, p. 77) or *could* (*Marine*, p. 787) arise from the jury contact. And the *Little* case (p. 865) holds that there must be a showing that the contact was *necessarily* harmless. Application of the doctrines of those cases, however, has the effect of turning the rebuttable presumption into a conclusive one for it is the reasonable possibility of harm inherent in serious extraneous jury contacts which provides the basis for the presumption of

prejudice which this Court has held is rebuttable. A serious contact cannot be mathematically proved to be "necessarily" harmless, and if such a contact is therefore to be treated as necessarily harmful, as in the *Little* case, it cannot, under any factual showing, be found to be harmless, and the presumption would be conclusive in its effect. And if there must be a clear showing, as held by the *Stone* and *Marine* cases, that no harm *might* or *could* have resulted from the jury contact, then the courts would, under their ordinary fact-finding processes, be powerless to make a determination of harmlessness, since it could not be done on the basis of any proven fact but only by resort to speculation. In the circumstances, application of the doctrine of the *Stone* and *Marine* cases would render the presumption conclusive in its effect, in contravention of this Court's holdings that it is rebuttable.

Petitioner characterizes the rule of the *Stone*, *Marine*, and *Little* cases as the "objective test of whether the evidence foreclosed all reasonable possibility of prejudice". (Pet. Br. 28), and asserts that the District Court erred in not applying that test in determining whether the extraneous jury contacts in the instant case were harmful. We submit that the District Court was not required to apply any test other than that adopted

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*The *Stone*, *Little* and *Marine* cases tend to confuse the basis for the presumption with the quantum of proof required to rebut the presumption.

by this Court in its prior opinion in this case and directed by its mandate remanding the case for a hearing.[17] The mandate called only for a factual determination whether the extraneous contact was harmful, and that is precisely what the District Court did. Hence, the District Court did not misconstrue the rule adopted by this Court with respect to the quantum of proof required to overcome the rebuttable presumption arising out of the extraneous jury contacts in this case. In any event, as we show in Point II of this brief, if the burden of proof is somewhat higher than we have argued, it was met in this case; the evidence supporting the finding of the District Judge that the extraneous jury contacts were in fact harmless to petitioner also foreclosed any real likelihood of their being harmful to him.

II

THE GOVERNMENT HAS MET ITS BURDEN OF ESTABLISHING AFFIRMATIVELY THAT THE EXTRANEOUS JURY CONTACTS WERE HARMLESS

The hearing held pursuant to the mandate of this Court was a full and unrestricted inquiry into the matters complained of by petitioner. The

[17] This Court, in its prior decision, relied entirely upon *Mattox* v. *United States*, *supra*, and *Wheaton* v. *United States*, *supra*, which recognize the rebuttable nature of the presumption, and did not mention *Stone* v. *United States*, *supra*, and *Little* v. *United States*, *supra*, despite the fact that the latter two cases had been cited by petitioner (*supra*, p. 26).

District Court did not restrict the scope of the hearing. This is amply demonstrated by the record. The Government presented the testimony of every person (twenty-six witnesses) who could possibly have had any knowledge of the matters in question. Petitioner had full opportunity for the presentation of evidence and for cross examination. He presented testimony and other evidence, and his counsel conducted a searching and exhaustive cross examination of the Government's principal witnesses. Moreover, due to the nature of the inquiry, Judge Goodman allowed the parties wide latitude and did not insist upon strict adherence to the technical rules of evidence.

The private communications involving juror Smith, his conversation with Satterly, his discussion of the conversation with Judge Foley, and his interview with F. B. I. Agent Callister, were thoroughly probed at the hearing. Judge Goodman found as a fact that the extraneous contacts were harmless to petitioner and in no way affected the fairness of his trial or the jury's verdict. (R. 38–39.) We submit that the findings of the trial court are fully supported by the evidence, and that the District Judge did not err in finding that the extraneous jury contacts were harmless. His refusal to grant a new trial is therefore not reviewable here, since he committed no abuse of discretion in his findings and conclusions. Moreover, the Court of Appeals concurred in his findings of fact (R. 340), and concurrent findings of

two courts below are final here in the absence of exceptional error. *Comstock v. Group of Investors*, 335 U. S. 211, 214; *Delaney v. United States*, 263 U. S. 586, 589–590; *United States v. Johnson*, 319 U. S. 503, 518. No exceptional error has been shown in this case.

It is clear from Smith's testimony and from that of Judge Foley and F. B. I. Agent Callister that Smith regarded Satterly's remark concerning petitioner as made in jest. Judge Goodman so found as a fact. Moreover, the record shows that Smith had good reason to believe that Satterly had spoken in jest. Smith was well acquainted with Satterly, although the two were not as petitioner suggests (Pet. Br. 7, 19) close personal friends; their acquaintanceship was based solely upon business transactions and a few chance meetings at a hunting club of which both were members. Smith knew that Satterly was in the habit of joking and had at times engaged in banter with him. Satterly had a valid reason for calling at the Smith home that evening; he did not go there under a pretext. After he had made the remark in question and had been informed by Smith that the latter could not discuss anything in connection with petitioner's case, he laughed and said no more about the matter. Satterly was packed and ready to leave Reno, permanently, when he called at the Smith home, and he actually departed from Reno the next day without leaving any immediate forward

ing address. These and other circumstances of the conversation all point to the reasonableness of the conclusion reached by Smith that the remark was intended as a joke. That Smith with good reason regarded the remark as such is persuasive evidence that he was not thereby prejudiced against the petitioner.

The fact that Smith, after turning the remark over in his mind for a day, decided to discuss it with Judge Foley, is not inconsistent with and does not detract from his impression of the remark as a joke. As Judge Goodman observed (R. 37–38), Smith appeared to be a "forthright and honest man who took his duties as a juror with the utmost seriousness and with a full understanding of his responsibility." Smith decided to report the matter to Judge Foley because he could not resolve in his own mind the question whether the conversation came within the scope of the Judge's customary pre-recess instructions to the jury. Also, he recognized that he could not be absolutely certain of Satterly's intentions. He concluded, therefore, that he should not rely solely upon his own judgment in the matter. As a conscientious juror, Smith prudently sought the advice of Judge Foley who confirmed his impression of the remark as a joke and instructed him to regard it as such. Smith's discussion of the conversation with Judge Foley had, if anything, a salutary effect in that it relieved his mind of any concern over the matter.

Smith not only regarded Satterly's remark as a joke, but he never entertained the thought that Satterly was connected with the defense. The latter fact is strongly indicative of the absence of prejudice on Smith's part. Smith testified unequivocally that, even had he considered Satterly's remark as a serious proposal (he recognized the possibility that Satterly may have been feeling him out), he would not have regarded the proposal as emanating from the defense. Under this hypothesis, Smith testified that he "would have thought that possibly Mr. Satterly was trying to make a deal for himself" (R. 97), and that, as he related to F. B. I. Agent Callister, if his [Smith's] reception had been cordial, Satterly might have considered contacting the petitioner and suggesting a deal. Satterly, as a matter of fact, had no known association with the petitioner and knew him only by sight.

Petitioner attaches considerable significance (Pet. Br. 15–18) to the reference in Satterly's remark to petitioner's sale of the Cal-Neva Club. He argues that the implication in the remark that he evaded tax on the sale of the Club was never negatived, in that Smith was never advised of the falsity of the statement, and that, consequently, there is no evidence to support Judge Goodman's finding that the remark was harmless. The argument ignores the facts that Smith considered the whole remark a joke and that he was instructed by the court to regard it as such. Ob-

viously, under such circumstances, there was nothing for the court to neutralize, and further emphasis might have been disadvantageous to petitioner.

Also strongly indicative of the absence of prejudice is the fact that Smith "wiped the matter" completely from his mind after discussing it with Judge Foley and Agent Callister (R. 65–66, 106–108). It was not brought to his attention again until after the verdict was returned, and when it was then called to his attention by newspaper reporters it had so completely left his mind that he was "dumbfounded" and "astonished" by their questions (R. 66, 102–107). Petitioner seeks to infer (Pet. Br. 25) that "the incident actually remained on the top of Smith's mind" because he mentioned it to juror Tinkham while riding home on the night the verdict was returned and discussed it with alternate juror Morris two weeks after the trial. The inference is unwarranted. Neither the Tinkham nor the Morris conversation with Smith took place until after the return of the verdict and until after the incident had been recalled to Smith's mind by the newspaper reporters.

The fact that Smith never considered the Safferly conversation to be serious, and the further fact that he forgot it entirely, amply support the District Judge's finding that the incident was harmless. And the evidence that he had so dis-

missed the matter from his mind as to forget it completely foreclosed any real possibility or likelihood that the incident was harmful to petitioner.[18]

As a Government witness, Smith was permitted over petitioner's objection to testify directly that the conversation between him and Satterly did not in any way prejudice his verdict in the case (R. 61–65). But the District Judge expressed some doubt whether, under this Court's decision in *Matter* v. *United States*, 146 U. S. 140, his testimony was properly admissible, and he indicated that he would not base his decision on the opinions of the witnesses. But he also indicated that petitioner's objection to the testimony went solely to its weight. In the latter respect the District Judge was correct. Although this Court in *Mattox* v. *United States*, 146 U. S. 140, approved the rule that a juror may not, on a motion for a new trial based on the bias of one juror, testify as to the motives and influences which affected the verdict, yet the Court in the later case of *McDonald* v. *Pless*, 238 U. S. 264, 269, stated that "the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict." To the same

[18] We do not, of course, concede that there was any burden on the Government, as petitioner contends, to adduce evidence that would foreclose any reasonable or real possibility of harm. See, *supra*, pp. 24–26. But in the instant case, the Government's evidence was sufficient to meet even petitioner's version of the quantum of proof.

effect, see *Ryan* v. *United States*, 191 F. 2d 779, 781 (C. A. D. C.), certiorari denied, *sub nom. Duncan et al.* v. *United States*, 342 U. S. 928. See also *Higgins* v. *United States*, 190 F. 2d 232, 223 (C. A. D. C.), certiorari denied, 333 U. S. 822.

It is clear, therefore, that Smith's statement that he was not prejudiced by the Satterly conversation was properly admitted in evidence by the District Judge. And since it was corroborated by other evidence, it was entitled to such weight as the District Judge might accord it in connection with the other evidence in the case.

The subject and purpose of the F. B. I. investigation is how clearly established by the record. Satterly and not Smith was the subject of the investigation. Although Judge Foley believed that Satterly's remark had been made in jest, he was not entirely certain of the latter's intentions. He, naturally, recognized the possibility that Satterly's remark may have been intended as a serious proposal and that, if so, it may have originated with the defense. Consequently, he requested an investigation of Satterly's background and associations in an effort to determine whether the latter had any ulterior motive in making the remark. As Judge Foley testified, "we believed that this was just a joke * * * but we wanted an investigation to make sure, to see what this man Satterly was after, whether it was just a joke or whether it was serious." (R. 136–

137). Petitioner argues (Pet. Br. 18–21), however, that since Judge Foley requested an investigation without informing the defense, he did not act as if he really believed that the remark was intended as a joke. This is a *non sequitur*. The investigation was sought to confirm or disprove the belief, and during the inquiry it was reasonable for the judge to act as if Satterly's "proposal" was serious and was connected with the defense. Moreover, the critical issue is not how the court viewed the remark but how Smith reacted to it.

Furthermore, Smith was fully informed and was well aware of the fact that it was Satterly's conduct which was under investigation, and that his own conduct was in no way suspect. The investigation of Satterly was actually concluded within three days and failed to disclose any information indicating that Satterly intended the remark as anything more than a joke. Since this was Smith's impression of Satterly's remark and since he had been instructed by the court to regard it as such, there was no necessity to make a further contact with him to advise him of the outcome of the investigation. Petitioner's statement (Pet. Br. 19) that "the F. B. I. continued to look over Smith's shoulder until the verdict came in" is at variance with the facts, as are his statements that Smith was "uneasy as to how the Government interpreted 'the incident'"; that he entertained "anxiety and concern" over the out-

comic (Pet. Br. 20); and that he "wondered" if he were suspect (Pet. Br. 25). The record shows that there was never any suspicion or suggestion of improper conduct on the part of Smith, and he was made fully aware of this.

Contrary to petitioner's contentions (Pet. Br. 36–37), the alleged conversation between juror Curnow and deputy marshal Boyd was also thoroughly probed at the hearing. It was alleged (R. 195–198) for the first time at the hearing that an irregular private communication involving juror Curnow had occurred during the trial. This allegation was not contained in either the petitioner's motion for a new trial (R. 12–17), or in the affidavit in support thereof (R. 3–12), which was filed in the District Court in February 1952. Also, it was not referred to previously when this case was before this Court, although petitioner was then in possession (R. 495–207) of substantially the same information with respect thereto as was disclosed at the hearing. Consequently, Judge Goodman questioned whether the matter was within the scope of the hearing ordered by this Court (R. 195–198). However, Judge Goodman, as petitioner concedes (Pet. Br. 36), admitted the evidence relating to the conversation on the ground that it might have some relation to the Smith-Satterly incident. The fact is that petitioner was given full opportunity to explore the matter at the hearing.

Curnow testified that, at some point during the trial, Boyd asked him whether he had heard any discussion among the jury indicating that one of the panel had been approached; to which Curnow replied in the negative; and that upon his inquiring of Boyd why the question was asked, the latter replied, "he was just curious." A signed statement obtained from Curnow, shortly before the hearing, relates substantially the same matters. Boyd denied asking Curnow anything pertaining to the case. He stated that during the trial he did not hear of any incident involving a juror.

Judge Goodman concluded that the evidence was too vague to support a finding that the alleged conversation between Boyd and Curnow took place, but he found that if the alleged conversation to which Curnow testified actually took place, it did not in any way affect the integrity of the verdict. The record supports Judge Goodman's finding, because the text of the alleged conversation shows on its face that it was without significance.

Assuming, *arguendo*, that Curnow's testimony reflects the facts and that Boyd actually made the inquiry in question, the evidence shows that Curnow was not thereby prejudiced against petitioner. In his signed statement which was introduced in evidence by petitioner's counsel (R. 210), Curnow categorically disclaims any preju-

dice or bias against petitioner as a result of the conversation (R. 211).

CONCLUSION

The District Court correctly construed and applied the law, announced by this Court's prior opinion, as to the rebuttable nature of the presumption of prejudice which arises from an extraneous jury contact, and that court's finding that the extraneous jury contacts involved herein were in fact harmless to petitioner is clearly supported by the evidence and did not, therefore, constitute an abuse of discretion. The decision of the court below should be affirmed.

Respectfully submitted.

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